In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 436

LEO J. SCHLINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury convicted petitioner of wilfully attempting to evade his income taxes for 1958, 1959 and 1960, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to five months imprisonment and a $25,000 fine (R. 426–427).

The evidence showed that petitioner's tax returns omitted receipts from a drug and liquor store (R. 117, 338–339) and interest on savings accounts (R. 336–338, 434). It was stipulated, subject to reversal of the district court's denial of a motion to suppress, that the taxable income of petitioner was understated in the amount of $10,660.03 on the 1958 return, $13,881.34 on the 1959 return and $12,510.45 on the 1960 return (R. 89, 433–435).

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Each week petitioner orally gave his bookkeeper a figure, purporting to be the receipts of the store for the preceding week, which the bookkeeper recorded in the books from which the returns were prepared (R. 95, 96). The bookkeeper believed that this represented the store's total receipts for the week (R. 109). Petitioner testified, however, that he did not give the bookkeeper the total weekly receipts, but only those attributable to profitable or "regular" sales. "Convenience" sales at little or no profit were not included in the figure given the bookkeeper, although the cost of the goods so sold were included in petitioner's calculations of his taxable income (R. 335–338).

Prior to trial petitioner moved for suppression of evidence on the ground that Treasury agents investigating the case had obtained such evidence in violation of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution (R. 6–10). After an evidentiary hearing the district court made findings of fact that may be summarized as follows (R. 77–80):

On September 11, 1961, Revenue Agent Thomas Murphy, who had been assigned to audit petitioner's tax returns for the years 1958, 1959 and 1960, by telephone made an appointment to meet petitioner in his drug store the following day. They met there and discussed the nature of the books and records maintained by petitioner, who granted Murphy permission to examine them. Murphy did not warn petitioner of his rights; the investigation at the time was wholly civil in character. During the next two months, Mur-

phy determined that an understatement of income had occurred.

Murphy then referred the matter to the Intelligence Division for further investigation. Special Agents Kirby and Manning first met petitioner at his drug store on April 24, 1962. Kirby told petitioner that he and Manning would conduct a preliminary investigation of petitioner's tax liabilities. Kirby advised petitioner that he did not have to produce any records or make any statement that he felt would incriminate him in any way, and also stated that he and Agent Manning would leave at any time petitioner told them to do so. Petitioner was not told that the investigation then looked toward the possibility of criminal action. Nor was he advised of his right to counsel. Petitioner made certain oral statements to the agents and turned over certain records to them. About two weeks later Kirby made a second visit to the drug store at which time he requested and received some additional records, which were returned to petitioner a few weeks later. Kirby's third and final visit was in February, 1964, when petitioner advised him that he never drew business checks on his personal account.

On the basis of these facts the district court denied the motion to suppress evidence that Kirby and Manning collected, holding that (R. 80):

> * * * no rights of defendant Schlinsky were violated, under the decision of the Supreme Court in *Miranda* v. *Arizona,* 384 U.S. 436 (1966) or *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), it being clear that the defendant was at no time when interviewed at his own store in

> custody or otherwise deprived of his freedom in any significant way. The record establishes that he was never interviewed by the agents except in the familiar surroundings of his own store, and I rule that he acted voluntarily in all of his dealings with the agents, free from any of the compulsive factors adverted to in the *Miranda* opinion. The teaching of both *Miranda* and *Escobedo* is inapplicable to this fact situation. * * *

The court of appeals affirmed.

No error has been committed. No further review of petitioner's conviction is justified.

1. The courts of appeals in six other circuits have been confronted with the same contention made here (Pet. 9–13)—that the Sixth Amendment requires a Special Agent of the Internal Revenue Service to advise a taxpayer of his right to counsel before discussing the taxpayer's returns and books, even when the taxpayer is not in custody or under any restraint, and is interviewed on his own premises. The circuits have without exception ruled in accordance with the decision below. See *United States* v. *Mancuso* (C.A. 4), decided May 19, 1967, 19 A.F.T.R. 2d 1583; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius* (C.A. 6), decided June 15, 1967, 19 A.F.T.R. 2d 1712, petition for certiorari pending, No. 372 this Term;

[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

United States v. *Mansfield* (C.A. 7), decided July 26, 1967, 20 A.F.T.R. 2d 5233; *Frohmann* v. *United States,* 20 A.F.T.R. 2d 5244 (C.A. 8); *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Rickey* v. *United States,* 360 F. 2d 32 (C.A. 9), certiorari denied, 385 U.S. 835.[2] This result is correct where, as here, there is not the slightest evidence, nor indeed any claim of, the sort of compulsion that the rule of *Miranda* and *Escobedo* is designed to prevent.

2. Equally without merit is the contention (Pet. 13–15) that, quite aside from *Miranda,* the agents violated petitioner's rights under the Fourth and Fifth Amendments by failing to advise him that he was the subject of a criminal investigation. No such warning is necessary in the circumstances presented here. *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Turner* v. *United States,* 222 F. 2d 926, 931 (C.A. 4), certi-

[2] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 347 (D. Ariz.), *United States* v. *Kingry*, 19 A.F.T.R. 2d 762 (N.D. Fla.), and *United States* v. *Turzynski* (N.D. Ill.), decided June 2, 1967, 20 A.F.T.R. 2d 5004, on which petitioner relies (Pet. 10), have each been overruled by a court of appeals decision in the same circuit. The weight of district court opinions is in accord with the views expressed in the courts of appeals. See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D.N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D.N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves* (S.D.N.Y.), decided April 28, 1967, 67–1 USTC, par. 9412.

orari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Montgomery* v. *United States*, 203 F. 2d 887, 892–893 (C.A. 5); *Hanson* v. *United States*, 186 F. 2d 61, 64–65 (C.A. 8); cf. *Lewis* v. *United States*, 385 U.S. 206, 209–211; *Hoffa* v. *United States*, 385 U.S. 293, 300–303.

3. Petitioner's final argument (Pet. 15–17) is that he was deprived of due process of law because Revenue Agent Murphy's grand jury testimony was not recorded and hence was unavailable for use in cross-examination at the trial. It is without substance. Rule 6(d) of the Federal Rules of Criminal Procedure, which authorizes the presence of a stenographer in the grand jury room for the purpose of taking evidence, is permissive and not mandatory. *United States* v. *Caruso*, 358 F. 2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2); *United States* v. *Martel*, 17 F.R.D. 326, 329 (N.D.N.Y.), appeal dismissed *sub nom. United States* v. *Caiola*, 222 F. 2d 369 (C.A. 2). A defendant has no constitutional or statutory right requiring that a stenographer take or transcribe the testimony of a witness before the grand jury. *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6); *United States* v. *Cianchetti*, *supra*, p. 591; *McCaffrey* v. *United States*, 372 F. 2d 482, 484 (C.A. 10), certiorari denied, June 5, 1967, No. 1322, October Term, 1966; *United States* v. *Westmoreland*, 41 F.R.D. 419, 422 n. 2 (S.D. Ind.); *United States* v. *Martel*, *supra* at 329.

It is true, as petitioner contends, that one error found in *Lenske* v. *United States*, 18 A.F.T.R. 2d

5815 (C.A. 9), was the prosecutor's failure to have transcribed the grand jury testimony of government agents. But the reversal there is based on several other grounds, and there is no indication that the failure to transcribe alone would have resulted in reversal.

There is, moreover, a material difference between the facts here and what the Ninth Circuit found to be the case in *Lenske*,[3] and this distinction as well shows that the failure to record Murphy's grand jury testimony could not have harmed petitioner. In *Lenske* the Ninth Circuit concluded that "the Government so arranged matters that * * * there would be no writing which the taxpayer might use for cross-examination." 18 A.F.T.R. 2d at 5822. Here the reason for not recording grand jury testimony was that Murphy submitted such detailed reports and work papers that recordation was unnecessary. The defense had available to it Murphy's entire "referral" report for use in cross-examination (R. 121–122).[4] When a question arose about a conversation between petitioner

[3] Even were there not this controlling distinction, it is not at all clear that a conflict with *Lenske* would exist; the Ninth Circuit has yet to act on a petition for rehearing *en banc* that the government filed on November 23, 1966.

[4] The court advised defense counsel that only the first two pages related to Murphy's direct examination but that he could read the balance of the report that evening and recall Murphy in the morning for additional cross-examination (R. 122). On the following morning the defense did not exercise its right to conduct further cross-examination (R. 148, 149).

Murphy's "final" report was not made available to the defense since the court found that nothing contained in it related to his testimony on direct examination (R. 135–136). See 18 U.S.C. 3500(c).

and Murphy on September 12, 1961, Murphy produced for the use of defense counsel a page from his work papers concerning that conversation (R. 136–137). When there arose the question of the time Murphy spent on this investigation during September, October and November, 1961, the witness produced his monthly reports and read into the record the precise days he had worked on this case and the number of hours spent on it each day (R. 132–133). Thus the defense had available to it such detailed and extensive records of Murphy's activities that the lack of a transcript of his grand jury testimony could not have been prejudicial.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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